SUPREME COURT U.S.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. ...663...

COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY, PETITIONER,

versus

SARAH ETHEL WILSON, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 19, 1957, being Case No. 16290.

(a) OPINIONS BELOW

The judgment of the District Court (R., pp. 253-4) is unreported.

The opinion of the Court of Appeals (R., pp. 289-301) is reported in 246 F. (2d) p. 922.

(b) GROUNDS OF JURISDICTION

(i) Date of Judgment or Decree: The judgment sought to be reviewed is dated July 19, 1957, and the judgment and opinion were entered on July 19, 1957. (R., pp. 289, 302.)

(ii) Date of Order on Rehearing: The petition for rehearing was filed on August 9, 1957, and on September 18, 1957, the Court made and entered an order denying said petition for rehearing. (R., p. 327.)

(iii) Statutory Provisions on Jurisdiction: The jurisdiction of this Court is invoked under 28 U. S. C., section 1254-(1), and pursuant to Rules 19-26 of this Honorable Court.

(c) QUESTIONS PRESENTED FOR REVIEW

Can a policy of monthly term insurance under whose provisions payment of premiums is a condition precedent be maintained in force for a period of almost a year from the date the last premium was paid, by testimony of Respondent that she mailed an envelope containing twelve $10.00 checks, which admittedly were not cashed and under the undisputed evidence and the finding of the jury and the court were not received by petitioner?

Can a premium be paid on a policy of insurance by estoppel instead of in cash?

Can an insured be relieved of the notice imputed to him from the knowledge of his agent, contrary to the law of the forum state?

(d) CONSTITUTIONAL, ETC., PROVISIONS

No constitutional provisions, treaties, statutes, ordinances, or regulations are involved.

(e) STATEMENT OF THE CASE

1. The Issues

Petitioner issued a monthly term policy of accident insurance in the principal sum of Twenty-five Thousand ($25,000.00) Dollars to George Wilson "in consideration • • • of the payment in advance of monthly premiums of $10.00" (R. 21, Plaintiff's Exhibit 1), and with the further

provision that premium payments should not maintain the policy in force beyond the next payment due date plus the grace period. (R. 76, Plaintiff's Exhibit 1.) The following stipulation is embodied in the pre-trial order (R. 72, 73):

> "It was agreed by all of the parties that the following are all of the issues in controversy in this cause:
>
> "Whether or not any premiums had been paid on said policy after payment of a premium on June 30, 1954, and whether or not said policy had lapsed or terminated according to its provisions because of the failure to pay premiums.
>
> "It is stipulated by and between the parties that no payments were made by or on behalf of plaintiff or insured to the defendant for premium payments under the policy in question by cash subsequent to the premium payment of June 30, 1954, and that the plaintiff or her agent does not have and cannot produce any check or premium receipt representing payment to defendant for premium payment under this policy subsequent to June 30, 1954.
>
> "It is further stipulated that plaintiff or her agent does not have and cannot produce any bank statement reflecting payment as premium on this policy subsequent to June 30, 1954."

The insured met his death on June 28, 1955. Respondent sued on the policy.

The basic issue in this case is whether this policy can be maintained in force for a period of almost a year from the date the last premium was paid, by the testimony of Respondent that she mailed an envelope containing twelve $10.00 checks, which admittedly were not cashed, and, under the undisputed evidence and the finding of the jury and Court, were not received by Petitioner.

With reference to this basic issue Petitioner contends:

(1) That Respondent has the burden of alleging and proving that the premiums were paid and the policy was in full force and effect at date of death of insured.

(2) That proof of payment must comply with the provisions of the policy.

(3) That the question of payment must be determined by principles of substantive law, unaided by the doctrines of waiver and estoppel as applied to forfeitures of life insurance contracts, which have no application in this case.

(4) That the great preponderance of the evidence showed without judicial conflict that the premiums had not been paid and the policy had lapsed and terminated according to its provisions prior to loss.

(5) That even if the doctrines of waiver and estoppel are present, they militate against Respondent and in favor of Petitioner; and that the entire evidence, viewed without judicial conflict, impels a finding in favor of Petitioner.

Petitioner endeavored to raise these contentions at every stage of the proceedings, from its Motion for a More Definite Statement filed to the complaint as framed in the State Court (R. 14) through and including its Alternative Motion for a Judgment *Non Obstante Veredicto* or for a New Trial (R. 255).

The verdict of the jury found that the premiums had not been paid, for it found for the "Face of Policy **less any premiums due Company.**" (Emphasis ours.) (R. 253.) The District Judge gave judgment for the Respondent in "the sum of $25,000.00 as damages, less the sum of $110.00, being the total amount due the Defendant by reason of checks for premiums not having been reduced to cash by it." (R. 254.) By no pleading and at no stage of the proceedings did Petitioner claim this or any amount from Respondent. We therefore have a verdict which finds both

that the premiums have been paid and that they have not! The District Judge expressly charged the jury (R. 241): "* * * I don't believe that there has been any showing in this case that the Company had received the payment." The verdict of the jury found that payment had never been received. We therefore have a holding that Petitioner has been paid by something it never got, and that despite the fact that the premium has been paid a judgment is rendered therefor. The premium is either being paid twice or it has not been paid at all!

2. The Policy

"COLONIAL LIFE & ACCIDENT
INSURANCE COMPANY,
COLUMBIA, SOUTH CAROLINA
A STOCK COMPANY, HEREINAFTER CALLED
THE COMPANY, DOES HEREBY INSURE
George Wilson of Opp, Ala. age 36
(The Insured) for a period of one months from Noon, Standard Time, at the place where the Insured resides, of the day this policy is dated, subject to the limitations and provisions herein contained against Loss resulting directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means during the term of this policy and sustained by the Insurance in the manner hereinafter described.

"The benefits shall be paid to the Insured hereunder, or, in case of death to
Sarah Ethel Wilson of Opp, Ala. relationship wife

"This policy is issued in consideration of the application and the payment in advance of the monthly premium of $10.00 to commence on the 31st day of July, 1951.

Section 3 of "STANDARD PROVISIONS" provides:

"3. If default be made in the payment of the agreed premiums for this policy the subsequent acceptance of a premium by the Company or by any of its

duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained."

Sections 1, 2 and 5 of 'GENERAL PROVISIONS' provide:

"1. Premiums are payable at the Home Office of the Company on or before the dates when due, in exchange for official receipts signed by the President or Treasurer and countersigned by such agent. Such a receipt shall be the only evidence of payment binding upon the Company. The payment of any premium shall not maintain the policy in force beyond the date when the next payment becomes due, except as herein provided.

"2. In the payment of any premium except the first, a grace period of fifteen days without interest will be allowed, during which time the policy will remain in force.

* * *

"5. The Company agrees that the sole condition for keeping this policy continuously in force until insured reaches the final age limit provided herein, shall be the timely payment by the Insured of the premiums hereon, and that until Insured reaches such final age limit the Company shall have no right to cancel this policy for any cause other than the failure of the Insured to pay premiums on or before their due date."

The policy has no cash surrender or loan or extended insurance values. Policies of this type have been uniformly held to be term policies, by both the Federal courts and the Alabama Supreme Court, the premium for which is based specifically upon the term covered, and they lapse of their own weight at the expiration of the term unless there is an additional payment of premium.

3. The Course of Dealings and Procedures

The insured selected a monthly policy as distinguished from an annual or semi-annual one, and elected to pay under the monthly payment plan. (R., pp. 155-7, p. 231.)

Petitioner contends that the source and origin of any course of dealings between the parties must be grounded on the plain provisions of section 1 of its policy, quoted above. The provision plainly stated that while premiums may be paid either at the Home Office of Petitioner or to an agent, there must be exchanged an official receipt, signed by its President or its Treasurer, and countersigned by an authorized agent. The provision then plainly states that this official receipt shall be the only form of evidence binding upon the company. It further states that a premium payment shall not maintain the policy beyond the next due date except for the grace period. The insured and beneficiary are charged with knowledge of and are bound by this provision.

To implement this provision, Plaintiff, upon receipt of a check series, furnishes its policyholder with an official receipt, as called for in the policy, signed by J. Clifton Judy, its Treasurer, and countersigned by an authorized agent. (R., p. 182, Deft. Ex. 4.) This receipt is in the following language:

OFFICIAL ACKNOWLEDGMENT of receipt of series of checks (Sgd) J. CLIFTON JUDY Treasurer	Policy Number	Due Date 19____

Countersigned by

_____ 19____

Dear Policyholder:

We acknowledge with thanks receipt of series of checks. One check of the series will be deposited each month. The paid checks will serve as the actual receipts for the monthly premiums.

On the reverse side is the following language:

"This Receipt is valid only if signed by the Treasurer of the Company and countersigned by the cashier.

"The check, draft, or other instrument given in payment of the premium is accepted for collection only, and such check, draft, or other instrument shall not operate as payment until the Company actually received the face amount thereof in cash.

"The acceptance by the Company of a premium past due is to be taken as an act of grace and not as a precedent nor a waiver of any of the policy conditions."

Concededly, Respondent testified that she did not recall having received this official receipt in years prior to 1954. (R., p. 118), but admittedly she did not read the notices, and admittedly they were not addressed to her, but to the insured (R., p. 126).

Concededly also, witnesses Benson and Cannon testified that they did not recall getting their receipts (R., pp. 133, 136), but both admitted that they did receive literature and notices resembling the receipt form from Petitioner; that they did not keep these, and that the only notices they

read were the ones that came with the checks. (R., pp. 134-5, 137.)

The procedure and safeguards for the handling of these notices, including the official receipt for the checks (now and during the period in question), are so foolproof that we describe them here briefly. (Helpful for an understanding of the technical details will be a perusal of the testimony of witnesses Judy and Mrs. Rodgers (R., pp. 156-9, 204-9)).

Incoming Mail (Witness Maddox). Mail is delivered in a U. S. mail sack at the counter in the office of Colonial, the switchboard operator calls the employee in charge of the mail room, who takes the sack to the mail room, where other persons are present; the mail bag is opened and the date imprinted on the envelopes before opening. The envelopes are then cut by an electric rotary blade along top and end, and stacked in front of the persons appointed to open it, and who then clip the contents to the envelope, the date being also stamped on the contents (R., p. 213). These packets are then assorted into the various baskets; there is a basket for the premium renewal department; the witness, Maddox, delivers the mail, in the baskets, to the various departments; he does not recall ever dropping a piece of mail; there have been no checks or correspondence lost in the mail room; if a piece of mail ever dropped to the floor he would have replaced it. (R. 214-215.)

International Business Machines (I. B. M.) Procedures

(Mr. Judy and Mrs. Rodgers). When an application comes in, the pertinent information appearing thereon is transferred by a key punch machine onto a punched card which is the "only means to make the machines work." (R. 204.) From the punched card other special purpose cards are made from which premium notices, series of predated premium checks and company records are prepared;

deposits of pre-dated checks are pre-determined according to due dates and all deposits are recorded. Also by means of such cards agents' commissions are determined and recorded and lists of lapsed policies printed.

From start to finish mechanical methods under personal supervision are provided and followed by cross-checking each operation for the purpose of eliminating the possibility of error.

* * *

Helpful also will be an examination of Petitioner's documentary evidence (Exhibits) and especially: List of Renewals Paid. (R. 52.) "George Wilson" marked "not paid"; "Journal Voucher" (R. 54) and charge of 97¢ on Agents' statement of 9-30-54, third from last, "George Wilson" (R. 55); List of Lapsed Policies, "George Wilson" (R. 62); "Cash Journal" sheets for June (1954) through the following June (1955), policies being listed serially by control numbers, and the name "George Wilson" and the number "7376" appearing June, 1954, only (R. 35), and not on any subsequent month (R. 36-49); also Defendant's Exhibits 3, 4, 6 and 16.

* * *

Renewal Checks and Notices (Witness Steigner). No records were found showing a receipt in July, 1954, of a check or series of checks from George Wilson (R. 175). The premium record card (R. 34, center) shows lapse on 8-15-54, recorded from a lapse notice. (R. 176.)

Procedures were set up for obtaining a new series of checks when all of the preceding series had been deposited; this department receives the new (unsigned) series on a predetermined daily basis, with four notices hereafter detailed, from the I.B.M. Department (R. 177) in a large stack and these are torn apart; the first notice is torn from the set and matched with the check series numbers and mailed to the policyholder (R. 179); (Defendant's Exhibit 13, also R., p. 69) twelve days before the anniversary date

(R. 179). The remainder of the notices is filed; there being file folders for each day of the month. A schedule is set up, and if the checks are not returned a second notice is detached from the set (Defendant's Exhibit 13, also R. 70) and is sent to the policyholder on the anniversary date. If the checks still remain unreturned within about 5 days, then the third notice (R. 71; Defendant's Exhibit 13) with another set of checks is sent to the policyholder (R. 184) and if no checks are received the 4th of such notices (the lapse notice) alone remains in the folder, and about 5 days after lapse, the acknowledgment forms which have not been used are destroyed and the lapse notice is taken from the folder and lapse is posted on the premium record card. (R. 182.) Had checks come in acknowledgment receipt forms would have gone to policyholder, selling agent and general agent. (R. 154.) Such checks are in a fireproof file, and deposited from time to time, as the file recurrently comes up each month. The company under its system can tell when a check should be "pulled", when it is misfiled or is sent down to I.B.M. Department at the wrong time. (R. 185.) When notices leave the witness' department they go to the mail room, then in charge of Witness Maddox. (R. 186.) Mr. Steigner knows of no loss of any checks. He would have known of any such loss. (R. 189.)

Outgoing Mail (Maddox). People from the various departments bring mail to the mail room where it is deposited in a box (See Deft's. Exhibit 18); it is examined for possible additional postage; the mail is fed into a stamping and sealing machine; if the machine spills mail, the machine is stopped and the spilled mail returned to the stack. The witness knows of no outgoing material that has ever been lost in the mail room. (Sometimes the machine pulls two envelopes through and a half stamp is put on each. Such errors come to light: the Post Office Department returns such envelopes and the stamping error is corrected

and the item is re-mailed.) After mail is stamped and sealed it is separated for "out-of-State or for South Carolina" and then tied up and placed in the mail bag. (R. 217.) The witness Maddox takes the mail bag by taxi to the Post Office and delivers it inside. (215.)

Respondent testified that in the years prior to 1954:

> "In other words, he signed twelve checks and I mailed them, **and they came in each month.**" (R. p. 116, emphasis ours.)

Miss Campbell, the agent and bookkeeper of the insured, testified (R., p. 143):

> "Q. You got statements from the Bank at least once a month, and sometimes did you get them more frequently?
>
> "A. No, for the Wilson Motors, I did not, only once a month.
>
> "Q. Well, every month you got a statement showing canceled checks for that month.
>
> "A. Yes, sir.
>
> "Q. I ask you if during the period of July 1951 through the month of June, 1954 you did not find among Mr. Wilson's canceled checks, one each month, a check to Colonial Life and Accident Insurance Company in the sum of $10.00? Through the month of June, 1954?
>
> "A. Yes, there is one. Each one would be deposited for a separate month.
>
> "Q. Now, during the period of July 1st, 1954 down to the month of June 1955, when Mr. Wilson met his death, you did not find a cancelled check for $10.00 payable to Colonial Life and Accident Insurance Company in any of those months, did you?
>
> "A. No, sir."

Petitioner's evidence showed without dispute that as to the same thirty-six checks each was: (1) Received by Petitioner; (2) Placed by Petitioner in the proper folder for the month that each was dated; (3) Pulled by Petitioner just prior to its due date; (4) Deposited by Petitioner in

its bank at Columbia for collection; (5) Cashed and paid by Mr. Wilson's bank at Opp. (Testimony of J. C. Judy, R., pp. 156-9; John R. Steigner, R., pp. 184-5); (6) Delivered to insured or his agent.

It was likewise undisputed that in Petitioner's handling of all checks, running into the millions, received from all its policyholders on policies similar to George Wilson's and including George Wilson's:

(1) Petitioner had never filed suit upon a check (R. pp. 164, 165);

(2) Had never otherwise sought to enforce a dishonored check, except to redeposit it during the grace period (R. p. 163);

(3) When a check was not paid during the grace period, it and all other pre-dated checks were returned to the insured and the policy marked lapsed (R. p. 164);

(4) No pre-dated checks are deposited after an insured dies (R. p. 165);

(5) The right of the insured to stop payment on his check is recognized and acceded to by Petitioner (R. pp. 166-7);

(6) The pre-dated checks are not taken into the assets of the company (R. p. 166), nor is the writing agent allowed commissions thereon until said checks are paid (R. p. 167).

The testimony as to the handling of received checks is therefore undisputed. There is no testimony in the record as to the handling of unreceived checks. **There is no evidence of a course of dealings between Petitioner and Respondent as to checks which were mailed but not received. But Respondent has to establish a payment through a "course of dealings," of which there is no evidence. There had been no dealings in unreceived checks, for all checks had been received, deposited for collection, and paid, all in accordance with the express provisions of the policy quoted above.**

Likewise, there was no evidence of any course of dealings at any time by which the mere act of mailing checks was treated by the parties as payment of premiums.

To get around this, Respondent (through her very able counsel) criticizes the language of the notices. But she cannot "hide with the hare and hunt with the hounds." By an Admission of Record (R. 29-31, 69-71, 82) she has admitted and she has testified under oath that she (or the insured) always sent the check promptly after receipt of the "First Notice" and they were promptly cashed (R., pp 115-6); that she (who was the only one who got them) **never read either the receipts or the notices that Petitioner sent** (R., pp. 123, 125); **and did not pay any attention to any of them until after liability was denied under the policy** (R., p. 124); **that she always sent the checks back promptly after the first notice** (R., pp. 128, 131). **Through her own sworn testimony she has eliminated any reliance upon any statements in the second and third notices and she has eliminated them from the "course of dealings," insofar as she and the insured are concerned, for they never came to their attention.** Respondent therefore must base her case upon the language of the first notice. (R., p. 69, Deft's Ex. 2.)

We respectfully submit that the language of this notice is nothing more than a courteous invitation to a policyholder to renew his term policy. It is not and cannot be construed as an agreement to accept anything other than cash in payment of premiums. It cannot create an estoppel because the policy was still in force when insured received it, and it expressly called his attention to (1) the due date of the next monthly premium, (2) that the Company had no more checks to deposit to meet that monthly premium, and (3) it gave him the option of continuing under the check plan or paying the premium on an annual or semi-annual basis.

The estoppel in this case runs against the insured and Respondent. Insured had a policy advising him that an "Official Receipt" was required. Petitioner took every precaution to furnish this "Official Receipt." If insured had not received these receipts as Respondent claims, he had the duty to inquire. He had the duty to effect payment of premiums to keep the policy in force, Petitioner did not have the duty or right to enforce payment. In the absence of receipts insured had no right to rely upon the mailing of the checks as payment. In the absence of receipts he could only know that payment had been made by informing himself that the bank had paid the checks. He is bound by what his inquiry would have disclosed, and the knowledge of his agent is imputed to him. He (or his authorized agent) had knowledge that every check he ever sent Petitioner had been promptly deposited for collection, cashed, and his account debited. He had notice that for eleven months no check had been cashed or debited to his account. Petitioner endeavored to warn him by its "Second" and "Third Notices", and had its agent call upon him. Surely Respondent cannot now claim that Petitioner has now been paid by twelve unreceived, uncashed checks, mailed eleven months before, the last of which barely covered the date of the accident. Even though proof of timely mailing of a check for payment of a single premium in some cases is held to justify a ruling that a policy has not lapsed, vastly different is the situation here, and it would strain the theory of estoppel to the breaking point to assert that the company is estopped to deny payment of twelve successive monthly premiums. The proven neglect on insured's part compels a different result. Estoppel is an equitable doctrine, and the equity points unerringly to Petitioner in this case.

(f) REVIEW OF JUDGMENT OF STATE COURT

Not applicable.

(g) REVIEW OF JUDGMENT OF FEDERAL COURT

The suit was filed in the Circuit Court of Covington County, Alabama, and was removed to the United States District Court, pursuant to 28 U. S. C., section 1441, on the ground that the amount in controversy, exclusive of interest and costs, exceeded $3,000.00, and there was diversity of citizenship between plaintiff and defendant. Federal jurisdiction was conceded, and the petition for removal, notice of filing petition and bond, certificate of service of removal papers, were omitted from the record pursuant to stipulation. (R., pp. 13, 14.)

(h) REASONS FOR ALLOWANCE OF WRIT

The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of the Supreme Court of Alabama relating to the payment of premiums on insurance policies and relating to the maintenance of term policies in force. The opinion of the court recognizes that the policy is a term policy for one month, and the payment of the premium each month in advance is a condition precedent to maintaining it in force. (Appendix A, notes 3 and 4.)

Admittedly the checks were not received. In the case of *Travelers Ins. Co. v. Brown*, 138 Ala. 526, 527, 35 So. 563 (1903), the Supreme Court of Alabama considered the question of an unreceived check in payment of a premium on an insurance policy, and stated:

> "The check was not received and the premium was not paid * * *"

The Alabama cases of *Pacific Mut. Life Ins. Co. v. Watson*, 223 Ala. 571, 137 So. 414 (1931), and *Atkinson v. Travelers' Ins. Co.*, 198 Ala. 509, 73 So. 903 (1916), s. c. 202 Ala. 226, 80 So. 48 (1918) are clear holdings that when

no payment is made under a term policy such as here involved, the policies expire of their own weight, and no notice of lapse or other notice is necessary.

The Supreme Court of Alabama has likewise held that where a note given by the insured and accepted by the insurer in payment of a premium was not paid on its due date, the policy was forfeited *ipso facto*, without any notice of lapse. *Provident Life and Acc. Ins. Co. v. Hollums*, 213 Ala. 300, 104 So. 522.

Petitioner has found no case where an Alabama appellate court has held that an insurance premium may be paid by a check or note which is not in fact paid. On the contrary, the Supreme Court of Alabama adheres very strongly to the rule that a check is presumed to be a conditional payment only, and a convenient means of getting the cash. *Ross v. State Life Ins. Co.*, 225 Ala. 410, 143 So. 827 (1932); *Jefferson Motors v. Williams*, 227 Ala. 432, 434, 150 So. 355 (1933); *Glenn v. City of Birmingham*, 223 Ala. 501, 502, 137 So. 292 (1931).

In the *Ross case*, the court held that an unpaid check was not payment, even though the company had given its official premium receipt for the payment.

There is another principle of law firmly established by a long line of decisions of the Supreme Court of Alabama with which the opinion of the Court of Appeals for the Fifth Circuit conflicts. The evidence was undisputed that the insured's agent and bookkeeper, acting in and about her authority and employment in examining the insured's checks and keeping up his check book, knew that the checks had been coming in regularly up to and including June, 1954, and that **for eleven consecutive months after June, 1954, no check had been cashed by his bank.** (R. p. 143.) Whether she reported this information to her principal, the insured, is unimportant under the Alabama law, for the principal is bound by the knowledge as a rule of substantive

law. In the case of *Hall etc. Co. v. Brown etc. Co.*, 174 Ala. 190, 202, 56 So. 726 (1911), the Supreme Court of Alabama said:

> "**Constructive notice to the principal through the actual knowledge of the agent is not a rule of evidence, but one of substantive law. Given notice to or knowledge of the agent, received while so acting, and the principal is conclusively bound by it; not because he even knows it in fact, because his actual knowledge is utterly immaterial, but because as to the thing the agent is doing the agent is in law the principal, and the principal is in law the agent. The legal identity is complete.**" (Emphasis ours.)

Other cases establishing the same rule are: *Tennessee Valley Bank v. Williams*, 246 Ala. 563, 566, 21 So. (2d) 868 (1945); *Williams v. Fundaburk*, 237 Ala. 30, 32, 185 So. 383 (1938); *Life & Casualty Co. of Tennessee v. Crow*, 231 Ala. 144, 147, 164 So. 83 (1935); *National Union Ins. Co. v. Morgan*, 231 Ala. 640, 166 So. 24 (1936).

The decision of the Court of Appeals for the Fifth Circuit utterly ignores the principle of these cases, and absolves the insured from all responsibility for this knowledge.

The decision of the Court of Appeals is inconsistent with the following of its own decisions: *Ripy v. Cloverleaf Life & Cas. Co.*, 9 F. (2d) 324 (5 Cir. 1925); *Mutual Benefit Health & Acc. Assn. v. Kennedy*, 140 F. (2d) 24 (5 Cir. 1943); *Aetna Life Ins. Co. v. Catchings*, 75 F. (2d) 628 (5 Cir. 1935); *Dreeben v. Mut. Life Ins. Co.*, 29 F. (2d) 963 (5 Cir. 1929); *Talbot v. Union Central Life Ins. Co.*, 241 Fed. 669 (5 Cir. 1917).

The decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the 8th Circuit in the case of *Taylor v. Mutual Benefit Health & Acc. Assn.*, 133 F. (2d) 279 (1943), which established the principle that payment required tender and acceptance, and

there could be no acceptance of a tender that was not received.

Petitioner submits that this case assumes an importance far beyond the mere determination of the issues between Petitioner and Respondent. It involves principles of vital importance to every insured who has a policy of insurance, and to each insurer who has issued a policy of insurance. The decision in effect establishes a doctrine of "payment by estoppel" of a premium, the payment in cash being a condition precedent. It is a case of first impression, so far as the use of the "Check Series Plan" is concerned. Diligent search by counsel for Petitioner and Respondent has discovered no case where an appellate court has considered and passed upon the "Check Series Plan." The "Check Series Plan" is growing in importance and use, not only in the insurance industry but in the entire commercial world as well. A decision by this Honorable Court, as the court of last resort, would be of vital importance not only to the insureds and insurers operating under the plan, but also to all other commercial and business establishments who use the plan. The plan has such obvious benefits and convenience to the insureds and debtors that anything that impairs its efficacy or use is a question of unusual and special importance. The decision of the United States Court of Appeals for the 5th Circuit in this case delivers a telling blow to this plan, and if allowed to stand, will undoubtedly impair and limit its use.

So much of the opinion of the Court of Appeals is devoted to a review of the automation employed by Petitioner, through the use of I.B.M. machines and procedures, that it becomes important to other users that the integrity of such systems is not brushed aside, judicially, upon grounds not supported by the principles of applicable State law.

(i) OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix A.

(j) JUDGMENT BELOW

A copy of the judgment of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix B.

CONCLUSION

For the foregoing reasons, Petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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S. AUGUSTUS BLACK,
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Attorneys for Petitioner.

December ..., 1957.

STEINER, CRUM & BAKER,
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Columbia, South Carolina,

Of Counsel.

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16290

COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY, APPELLANT,

versus

SARAH ETHEL WILSON, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

(July 19, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge: The principal question is whether an insurance company may, and did, permit the Assured to keep the policy in force by the mailing of premium checks never shown to have been actually received. Subsidiary to this main question which raises the sufficiency of the evidence to support the jury verdict for the beneficiary are procedural matters relating to the charge to the jury.

George Wilson, owner of a business and apparently regarded as a sufficiently responsible and substantial business man to qualify for the Insurer's "Executive and Professional Accident Policy," died from accidental means

June 28, 1955. He had carried this policy since July 31, 1951, when he was then 36. Except for nonpayment of premiums, it was expressly declared to be "non-cancellable and guaranteed renewable to age eighty * * *." Under optional premium payment plans (annual, semiannual, quarterly or monthly), it was written for the period of the premium payment, in this case one month. While this denominated it a monthly policy, the Insurer, for the premium payment plan, treated the anniversary date as July 31 of each year. There is no dispute that for the years 1951-1952, 1952-1953, 1953-1954 (ending July 31, 1954) the premium was promptly paid in full by the method soon described. The question narrows down to whether, in July or August, 1954, a sufficient "payment" of the next twelve months' premium was made to keep it in force for the eleven months up to the time of the Assured's death.

It was stipulated that no payments were made by the Assured in *cash* subsequent to the premium payment of June 30, 1954, and the beneficiary (Mrs. Wilson) does not have and cannot produce any cancelled check or premium receipt representing payments subsequent to June 30, 1954, or any bank statement reflecting payment as premiums on the policy subsequent to June 30, 1954.

On it the Insurer claimed, and now reiterates, that the policy lapsed or terminated by its own terms for failure to pay premiums. Underlying this was the persistent demand that the policy terms required cash with an official receipt which "according to the law of the Medes and Persians * * * altereth not," *Cargill, Inc. v. Compagnie Generale Transatlantique*, 5 Cir., 235 F. (2d) 240, 242, 1956 AMC 1545, 1557. With this as the major theme, recurring from time to time as the structure develops, the

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[1] "1. Premiums are payable at the Home Office of the Company, but may be made to an authorized agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or Treasurer and countersigned by such agent. Such a receipt shall be the only evidence of payment binding upon the Company. The payment of any premium shall not maintain the policy in force beyond the date when the next payment becomes due, except as herein provided.

"2. In the payment of any premium except the first, a grace period of fifteen days without interest will be allowed, during which time the policy will remain in force."

Insurer, urging[2] what is in reality not in dispute, that the policy was for one month and would not be effective unless, for the next month, the premium were paid becomes almost transfixed by its preoccupation with another principle of universal acceptance—that ordinarily, in the absence of a clearly expressed intention to the contrary, payment by check is conditional only until honored and paid on presentment.[3] From this it presumably argues that since the check is not payment until cashed, it could under no circumstance constitute such payment as would keep the policy in force if never received, or if received, never acknowledged by the official[4] receipt, note 1, *supra*.

But this ignores altogether what the Insurer did and what Alabama considers an insurer may do or lead an assured to think it has done. *Travelers Ins. Co. v. Brown*, 138 Ala. 526, 35 So. 463. Undoubtedly the Insurer could

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[2] It relies on the cases holding industrial group accident and life policies are term policies for the period covered by the premium payment ordinarily deducted by the employer: *Pacific Mutual Life Insurance Co. v. Watson*, 223 Ala. 571, 137 So. 414; *Travelers Insurance Co. of Hartford v. Atkinson*, 198 Ala. 509, 73 So. 903, 202 Ala. 226, 80 So. 48; *Mutual Benefit Health & Accident Association v. Kennedy*, (Florida), 5 Cir., 146 F. (2d) 24; *Talbot v. Union Central Life Insurance Company* (Florida), 5 Cir., 241 Fed. 669; *Cf. New York Life Insurance Company v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

[3] It urged especially the following excerpts from cases upon which certain indicated requested charges were based: *Carcaba v. McNair*, 5 Cir., 68 F. (2d) 795, 796: "A check is not payment until itself paid, unless specially accepted as payment," of which Insurer's requested charge No. 9 was a paraphrase. As the basis for charge No. 7, *Ross v. State Life Insurance Company*, 225 Ala. 410, 411, 143 So. 827: "And this is in harmony with the expressions found in our own cases to the effect that, in the absence of an agreement to the contrary, a check is merely a conditional payment, and is presumptively received, not as a payment, but 'as a convenient means of getting the money.'" *Peoples Bank & Trust Company v. Walthall*, 200 Ala. 122, 75 So. 570 (1917), was the asserted source of requested charge No. 8 which read: "A check received in payment of an obligation is not the same as cash unless it is so accepted and treated by the party receiving it and unless it is so received and treated it in law is not a payment." And requested charge No. 6 came from language in *Jefferson Motors Co. v. Williams*, 227 Ala. 432, 434, 150 So. 355 (1933).

[4] Under our disposition of the case, we do not reach the Insurer's peremptory insistence that insurance companies can insist on the literal, formal receipts prescribed, for which it cites *Independent Life Insurance Company v. Woods*, Ala. App., 129 So. 487, 488; *Berryhill v. Ellett*, 10 Cir., 64 F. (2d) 253, 257; *Braman v. Mutual Life Insurance Company*, 8 Cir., 73 F. (2d) 391, 393-394; *Lata v. New England Mutual Life Insurance Company, D.C.N.Y.*, 68 F. Supp. 542, 544; *Mauze v. N. Y. Life Insurance Company*, 68 Atl. 31, 32, 34 (N. H. 1907).

have insisted on strict literal, formal, punctilious compliance with the policy provisions, note 1, *supra*. But it did not. And this was neither inadvertent nor the result of careless or solvenly business habits. It was the result of an adoption of a comprehensive plan by which, as far as possible, the thousands of routine recurring items of an insurance company could be performed by or through the miraculous capacity of IBM machines.

If not altogether, at least as to the Executive and Professional Accident Policy, it was of acknowledged benefit to the Insurer for the Assureds to pay, not in cash, but by check. And it facilitated it further for the Assured to use the postdated "Series Checks" prepared and transmitted by the Insurer to the Assured for that purpose. Thus, 12 days prior to the anniversary date (here July 31, 1954), almost as though this Artzybasheffian marvel had reached down to pluck it out of the file, a First Notice was mailed to the Assured. This notice, as well as the Second Notice and the third, Final Notice, were prepared in manifold form from punch cards by the IBM printer and sorter. The "Series Checks" were likewise printed from punch cards by IBM on paper with punch holes at each end permitting processing in these machines. The machine automatically printed on the check the policy date, name of the Assured's bank on which the check was drawn, the predetermined postdate for each of the successive twelve checks and the amount. All was done save the Assured's signature as the drawer. These "Series Checks" were sent with the First Notice, and, when returned signed by the Assured, were placed in a file from which as each month rolled around, that month's check was removed, more cards were punched to show payment of the premium, credit to the writing agent's account, and a deposit to the Insurer's bank account. With 500 to 1000 pieces of mail on an average day and twice as many on Mondays or following holidays, two-thirds of which were premium payments, it was of great advantage, if not necessity, to the Insurer that this all be as routine as possible. The more that checks were used, and indeed, the more the "Series Checks" plan was followed, the more fixed was the routine, the greater the savings in per-

sonnel time, and less the chance there was of error. And, of course, the system was keyed to the handling of it once each year on an annual basis.

When the First Notice was sent just prior to the anniversary date, a set of twelve "Series Checks" was enclosed for the next year. In the plainest of simple English words, this Notice told the Insured that if he would *sign* and *return* the "Series Checks," it was assurance "that your policy will be kept in force for another twelve months' period * * *." Not only that, the Notice left it to the Assured to exercise the option of using the check plan devised by the Insurer or, as indicated, the alternative annual or semiannual premium.

Under the "Series Check" plan, if, by the anniversary date, the "Series Checks" were not received from the Assured properly signed and ready for filing for later serial

A

Colonial Life & Accident
Insurance Company
Columbia, S. C.

The monthly premium on the insurance contract below will become due on the date shown.

Policy Number Due Date
19
Agency

Premium
Series of 12 checks enclosed

PREMIUM
NOTICE

Please Return This Notice
With Check Series

Dear Policyholder:

The last of your series of checks in the amount of $ each covering the monthly premiums on the above policy has been deposited. We are enclosing herewith a new series of checks for you to sign and return to this office, thus assuring that your policy will be kept in force for another twelve months period. We appreciate very much your placing a part of your insurance with our Company. If we can be of service in any way, be sure to let us know.

J. CLIFTON JUDY,
Treasurer.

OPTIONAL PREMIUM PAYMENTS

If you prefer not to continue using the check plan as outlined above for the payment of your premium, the premium can be paid on the following basis:

Annual Premium $ Semi-Annual Premium $

Checks, Drafts and Money Orders should be made payable to COLONIAL LIFE & ACCIDENT INSURANCE COMPANY. BE SURE YOUR PROTECTION IS IN FORCE WHEN YOU NEED IT.

deposit, a Second Notice[*] (without another set of checks) was sent. Again, by simple, plain words the Assured was informed that all that was needed was to *sign* and *return* the checks for it stated, "By signing and returning these checks today you can be assured that your future is protected." And, of great importance, the Assured was informed that if he had done these things, no further action was required for, "If these checks have already been mailed please disregard this notice."

If, by the fourth or fifth day after the anniversary date, the checks had not yet been received by the Insurer, the third and Final Notice was sent specifying the expiration of the grace period by date. Another set of "Series Checks" was enclosed and by this Final Notice, it again directed that if you have already mailed a series of checks on this policy please disregard this notice." This was repeated by

[*] As a manifold copy, the Second Notice form was substantialiy as the First Notice, note 5, *supra*. The main paragraph stated:

"Dear Policyholder:

"The last of your series of checks in the amount of $ each covering the monthly premiums on the above policy has been deposited. To date we have not received the new series of checks which were sent to you in the past few days. By signing and returning these checks today you can be assured that your future is protected. If these checks have already been mailed please disregard this notice."

On the same form as note 5, *supra*, the front side stated:

"Dear Policyholder:

"The last of your series of checks in the amount of $ each covering the monthly premiums on the above policy has been deposited. Some time ago we sent you a new series of checks to be signed. To date we have not received those checks. In case those checks have been lost we are enclosing another series. Please sign and return these checks in the enclosed envelope. Please do this immediately as the grace period on your policy has almost expired. If you have already mailed a series of checks on this policy please disregard this notice."

The reverse side was as follows:

THIS IS YOUR LAST NOTICE

This "LAST CALL" Notice is the FINAL NOTICE which will be given for the premium now past due on your policy. Payment of this premium must be tendered, and if mailed, your remittance must be postmarked not later than the last day of grace.

Should you desire any information or service in connection with this premium payment or your policy communicate with us at once, in order that we will have time to serve you before the final date for payment expires.

BE SAFE—Make payment of this premium now—

NO FURTHER NOTICE WILL BE GIVEN.

Colonial Life & Accident Insurance Company

1612 MARION STREET :-: COLUMBIA, S. C.

If Remittance Has Been Mailed Please Disregard This Notice.

the very last words on the reverse side which contained another statement of decisive significance that "Payment of this premium must be tendered, and if *mailed*, your remittance must be post-marked not later than the last day of grace." It was a geographical fact beyond dispute, categorically admitted in the plainest of testimony from a high-ranking executive officer of the Insurer, that a check mailed with a postmark not later than the last day of grace obviously could not clear and be cashed within the grace period, so that the mailing, at least if subsequently received, of that check was sufficient "payment" to keep the policy in force.

Since this language was so simple, so direct, so oft repeated in various ways, to inform the Assured that use of the "Series Checks" by mail would enable the Assured to keep the policy alive, it was, if not as a matter of law, certainly as a fact issue, adequate, if followed, to make the mailing of the check a sufficient payment to keep the policy in force, note 10, *infra*.

There was ample evidence from which the jury could, and presumably did, find that in the latter part of July, or first few days of August 1954, the Assured, George Wilson, was seen to have in his possession a group of "Series Checks" which he then and there signed and which were almost instantaneously mailed in a nearby United States Postal Mail Box, properly stamped and addressed to the Insurer. To be sure the evidence of the Insurer, in the operation of its mail room and IBM procedures, was impressive that it was almost impossible to lose a check and none had ever been lost, but this of necessity came from the records, not personal knowledge of each of the millions of transactions occurring since the system was instituted in 1940. And the evidence did show that, though unlikely, access could be had to the mail by unauthorized persons at least at one stage. And the experience of this case demonstrated that, as with the perfect crime, there was one place where the intricate procedure was not foolproof. It should be remembered here that after the First Notice each succeeding notice including the Final one instructed the Insured to disregard the Notice if the "Series Checks" had

already been mailed. Thus, if the Assured in fact mailed them (as the jury verdict here requires us to assume was done), the Assured had no way of knowing that his checks had not been received, since no notice of lapse was sent after failure to respond to the third Final Notice. And at the same time, the premium payment department in its IBM routine treated it as though it had never been sent. There was no procedure to care for the situation in which the envelope containing the "Series Checks," or the "Series Checks" themselves had miscarried en route, had been received, but not processed because misappropriated, lost or mislaid.

Where an Insurer establishes a procedure by which premiums are to be remitted and considered "paid" sufficiently to keep the policy in force, a compliance with it by the Assured has that effect,[10] and whether the check is

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[8] The manifold forms, see notes, 5, 6 and 7, *supra*, contained a separate printed acknowledgment form which the Insurer claimed was mailed automatically after receipt of the "Series Checks." It stated: "We acknowledge with thanks receipt of series of checks. One check of the series will be deposited each month. The paid checks will serve as the actual receipts for the monthly premiums." This, the company claimed, would indicate to the Assured that the "Series Checks" sent by him had been received by the Insurer, and the absence of one would indicate that the "Series Checks" had not been received. There was ample evidence, however, from several policyholders which raised an issue of fact whether in fact this acknowledgment form was regularly sent or its absence would have the significance asserted.

[9] Of course, none was required as a matter of law. *Pacific Mutual Life Insurance Company v. Watson*, 223 Ala. 571, 573, 137 So. 414; *Alabama National Life Insurance Company v. Smith*, 214 Ala. 585, 586, 108 So. 524; *Penn Mutual Life Insurance Company v. Piquett*, 229 Ala. 203, 206, 155 So. 702, but the absence of such a notice had some relevance as bearing upon a procedure which must have envisaged the possibility of checks actually sent, but not received and processed.

[10] As a contractual matter, this depends on the intention of the parties of which, as here, the forms of notices and the procedure prescribed and followed are evidence. "The effect of mailing a premium, as regards payment, depends wholly upon the intention of the parties. While generally payment of a premium would not be effected until actual receipt by the insurer, where the insurer or its authorized agent requests or directs payment by mail, it is paid when such premium is dropped in the post-office." 14 Appleman, Insurance Law and Practice, §7990, p. 250; and see, 14 *id.*, pp. 251, 253. *Currier v. Continental Ins. Co.*, 53 N. H. 538, 547; *Travelers Ins. Co. v. Brown*, 138 Ala. 526, 35 So. 463; *Kenyon v. Knights Templar*, 122 N. Y. 247, 25 N. E. 299; *Palmer v. Phoenix Mut. Ins. Co.*, 84 N. Y. 63; *Guilfoyle v. Nat'l Life*, 55 N. Y. S. 236; *Calvi v. U. S. Mutual Ass'n*, 66 Hun. 543, 21 N. Y. S. 734; *Brown v. Pilot Life Ins. Co.* (S. C.), 194 S. E. 121, 122, 123; *Protection Ins. Co. v. Foote*, 79 Ill. 361; *Schotzhauer v. Mut. Ins. Co.* (Mo.), 128 S. W. (2d) 1061;

conditional, provisional, or absolute payment is not really the question.[11]

These matters were submitted under a charge which fairly presented the controlling issues. There was no error for declining the specified requests of the Insurer which related to the conditional or absolute character as payment of checks when received, for to the extent pertinent they were given in substance. And if an exception was adequately preserved, there was no error in the Court's giving one of the Assured's requested charges in the course of which the word "forfeit" was used at one place. To the jury it conveyed the idea of the policy being no longer effective for nonpayment of premiums. That was sufficient. For everyday men, the Court can use their language and will frequently do better than if he sticks to the heavy jargon of the law which, if clear to lawyers, is certainly not always so to juries.

Tippett v. Farmers Mut. (Mo.), 47 S. W. (2d) 225, 227; *Whitley v. Piedmont Life Ins. Co.*, 71 N. C. 480; *Postal Ind. Co. v. Rutherford*, Tex. Civ. App. 49 S. W. (2d) 1095; *Primeau v. Nat. Life*, 28 N. Y. Supp. 794, 797, affirmed, 144 N. Y. 716, 39 N. E. 858; *Krebs v. Security Trust & Life Ins. Co.*, 156 Fed. 294; *Williams v. Carpenter & Co.*, 36 Ala. 9, 12; *Mackey v. Dobrucki*, 116 Conn. 666, 670, 671; *Faut v. Miller*, Tex. Civ. App., 218 S. W. (2d) 901, writ of error refused, NRE; *McCluskey v. Nat. Life*, 28 N. Y. Supp. 931; *Pennsylvania Lumberman's Ins. Co. v. Meyer*, 2 Cir., 126 Fed. 352; *Reed v. Vermont Acc. Ins. Co.* (Vt.), 9 A. (2d) 111; *Tayloe v. Merchants Fire Ins. Co.* (U. S.), 9 How. 390, 398. Except for three cases which are immaterial and three cases which it says may be in point but contrary to *Ripy v. Cloverleaf Life & Casualty Co.*, 5 Cir., 9 F. (2d) 324 (but which we consider did not deal with the situation of this record), the Insurer virtually concedes the correctness of all these cases but seeks to distinguish them as avoiding a forfeiture of an existing contract, not the termination of one by its own terms. Since in either case it is because the insurer has established a procedure which the assured may and did follow, the distinction is too subtle and escapes us.

[11] So far as the steps to keep the policy in force are concerned, the evidence is undisputed. Under the IBM procedure, on receipt of a check or the serial deposit of a post-dated "Series Check", it is immediately credited to the policyholder's and the writing agent's accounts, even though it has not yet been cleared and accepted by the drawee on presentment. So much so is it, that if a check is dishonored a special notice is sent to the assured stating that the check has been redeposited for clearance. And the third Final Notice, note 7, *supra*, permits a check to be postmarked within the grace period even though, when mailed, it cannot possibly arrive or clear until after the expiration of the grace period.

Of course, if not ultimately received, and paid in fact, the insurer has the right to the actual payment of the premiums, *Travelers Ins. Co. v. Brown*, *supra*; *Hollowell v. Insurance Co. of Virginia*, 35 S. E. 616 (N. C.).

Considering the way this case was brought under Alabama law, the forum state, 5 Moore's Federal Practice, §43.08, pp. 1336, 1337, the burden of proving nonpayment was properly placed on the Insurer. *Sovereign Camp, W.O.W. v. Gay*, 217 Ala. 543, 117 So. 78, 82; *Independent Life and Accident Ins. Co. v. Cannon*, 263 Ala. 565, 83 So. (2d) 288; *United Benefit Life Ins. Co. v. Dopson*, 232 Ala. 625, 169 So. 287; *Pilot Life Ins. Co. v. Hawkins*, 222 Ala. 218, 131 So. 889; cf. *Siller v. United States*, 5 Cir., 195 F. (2d) 195. That should end the matter. Actually, from the reading of the whole charge, that burden was really put on the Insurer only as to non-receipt and actual payment. As to the balance of the Assured's theory, *i. e.*, the establishment of a procedure or course of dealing for payment of premiums by mailing checks and compliance with it by the Assured, the charge plainly stated that "The burden is on the Plaintiff to show what the course of the dealings was, to reasonably satisfy you as to the evidence as to what the course of dealings was in that respect."

If there are risks involved in this system, it is the Insurer's system to alter. If the risk of this system, or that of possible perjury by interested parties outweighs the evident savings in personnel and operating costs which leads its executives to declare that the procedure is highly beneficial to it, the Insurer can change it. The Insurer can refrain from advising the Assureds that mailing of checks will assure "that your policy will be kept in force for another twelve months' period" or that "by signing and returning these checks today, you can be assured that your future is protected.' Until that is done, the Assured, unaware that his "Series Checks" have gone astray, if he complies with those directions, has the benefit of these assurances.

AFFIRMED.

A true copy.

Test: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit.

By GILBERT F. GANUCHEAN,
Deputy,
New Orleans, Louisiana.

APPENDIX B

JUDGMENT

Extract from the Minutes of July 19, 1957

No. 16290

COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY

versus

SARAH ETHEL WILSON

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Colonial Life and Accident Insurance Company, and the surety on the appeal bond herein, Glens Falls Insurance Company, be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.